SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1962

No. 656

GEORGE W. SHELDON, et al.,

Appellants,

vs.

PAUL FANNIN, et al.,

Appellees.

APPELLEES' MOTION TO DISMISS APPEAL FROM THREE-JUDGE COURT ORDER OF SEPTEMBER 18, 1962, IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF IN SUPPORT OF MOTION

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Supreme Court of the United States

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MOTION TO DISMISS APPEAL

PAUL FANNIN, W. W. DICK, RICHARD A. HARVILL, LAWRENCE J. WALKUP, G. HOMER DURHAM, CHARLES BURTON, BESSIE KIDD BEST and WALDO M. DICUS, as Members of the State Board of Education of the State of Arizona, and Such Board, W. W. DICK, as Superintendent of Public Instruction of the State of Arizona, FRANK CROSBY, VERA MATTHEWS and A. L. PENROD, as Members of the Board of Trustees of Pinetop Elementary School, Pinetop, Arizona, and Such Board, appellees in the above entitled cause, move this Honorable Court to dismiss with costs the appeal of appellants from the Order of September 18, 1962, of the three-judge court in the United States District Court for the District of Arizona on the grounds that the appeal is not within the jurisdiction of this Honorable Court because the appeal was not taken in conformity to 28 U.S.C. § 1253 for the following reasons:

I.

The Order of September 18, 1962, was not an order granting or denying an injunction as required by 28 U.S.C. § 1253, which permits a statutory appeal from a decision of a three-judge court to this Honorable Court.

II.

The Order of September 18, 1962, did not dismiss appellants' case but directed the matter to be heard by the single judge as if the three-judge court had never convened.

III.

Appellants' case has not been heard on the merits as to the issues raised by the pleadings in the lower court.

Dated this ..... day of January, 1963.

ROBERT W. PICKRELL
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FRANK SAGARINO
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Supreme Court of the United States

OCTOBER TERM, 1962

No. 656

GEORGE W. SHELDON, et al.,

Appellants

vs.

PAUL FANNIN, et al.,

Apellees

BRIEF IN SUPPORT OF MOTION TO DISMISS

The Order of September 18, 1962 reads as follows:

"As we understand the position of plaintiffs (through examination of the entire record before us, their briefs and oral argument,) it is that members of a local school board, acting under authority bestowed by state statutes, state-wide in their application to school boards, have violated constitutional rights of these plaintiffs. Such violation consisted of requiring these plaintiffs, as students, contrary to their religious beliefs and on penalty of expulsion, to stand while the national anthem was sung or played in school. This requirement was not imposed by statute or by administrative action of any state agency or officer other than the local school board itself, and had no application to any other school district.

As we read the decisions of the Supreme Court of

the United States this does not present a case for a three-judge court.

Ex parte Bransford, (1940), 310 U.S. 354

Wilentz v. Sovereign Camp (1939), 306 U.S. 573

Ex parte Public National Bank of New York (1928), 278 U.S. 101

Ex parte Collins (1928), 277 U.S. 565

See: *City of Cleveland v. U.S.* (1945), 323 U.S. 329

Plaintiffs have this day tendered four proposed amendments to the first amended complaint. Their motion for leave to amend in these respects is opposed by the defendants. Without ruling on these motions this Court has accepted them as offers of proof. We find nothing in them to change our views as here expressed.

This Court as now constituted may then proceed no further.

Accordingly, upon this Court's own motion, IT IS ORDERED that this case proceed henceforth before the single judge to whom the case was originally assigned, as if this three-judge court had never been convened.

Dated this 18th day of September, 1962.

CHARLES M. MERRILL
United States Circuit Judge
DAVE W. LING
United States District Judge
ARTHUR M. DAVIS
United States District Judge

(Endorsed)
FILED
SEPT. 18, 1962
WM. H. LOVELESS, *Clerk*
United States District Court
for the District of Arizona" (Tr. 11 [1-2])[1]

28 United States Code, Section 1253, reads as follows:

"Direct appeals from decisions of three-judge courts.

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.—June 25, 1948, ch. 646, 62 Stat. 928."

This case had on August 8, 1962, been set for trial on September 18, 1962. (Tr. 19 [2]) The three-judge court on September 18, 1962, upon examination of the entire record ordered the case to proceed before the Honorable Arthur M. Davis, United States District Judge, at 1:30 p.m. (Tr. 13 [1-3]) The trial setting of September 18, 1962, was vacated as counsel for appellants avowed that he intended to seek a writ of mandamus from this Honor-

[1] Reference numbers appearing within brackets preceded by "Tr." refer to pages of the typewritten transcript of record as certified by William H. Loveless, Clerk of the United States District Court for the District of Arizona.

able Court to compel the three-judge court to reconvene. (Tr. 19 [3]). A motion for leave to file petition for writ of mandamus and petition for writ of mandamus has been docketed in this Court under No. 823 Misc.

The Order of September 18, 1962, by the three-judge court from which appellants appeal to this Court is not an appealable order within the statutory requirement of 28 U.S.C. § 1253, as the order does not grant or deny an interlocutory or permanent injunction. The order cannot be deemed a final judgment as to the rights of the appellants because the order directs the case to be heard by a local district judge. Said order does not preclude appellants from prosecuting the case based upon the issues created by the pleadings. The only effect of the order was a determination based upon the record that the matters contained in the case were not properly within the scope of determination by a three-judge court. Appellants could have and still have their right to be heard on the merits before the local district court as to their claim for relief.

Where a three-judge court properly determines from the record that a suit is not triable by a three-judge tribunal and directs that the case be heard by a single district judge, direct appeal to this Court is not authorized by 28 U.S.C. § 1253, and appellants cannot contend that they are aggrieved by the order of the three-judge court.

American Insurance Co. v. Lucas, 314 U.S. 575 (1941)

California Water Service Co. v. City of Redding, 304 U.S. 252 (1938)

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U.S. 386 (1934)

Rorick v. Board of Comm'rs of Everglades Drainage

Dist., et al., 307 U.S. 208 (1939)

Wilentz v. Sovereign Camp, W.O.W., 306 U.S. 573 (1939)

Respectfully submitted,

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